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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re COREY C. et al., Persons Coming Under
the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ALEXANDRA C.,

Defendant and Appellant;

COREY C.,

Defendant and Appellant.

F073126

(Super. Ct. Nos. 14CEJ300232-1,
14CEJ300232-2 & 14CEJ300232-3)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Brian M. Arax,
Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Franson, J.

Corey C. (father) appeals from the juvenile court's orders denying his petition for modification under Welfare and Institutions Code section 388¹ and terminating his parental rights under section 366.26 as to his now four-year-old son Corey C., Jr. (hereafter "Corey").² Father contends the juvenile court abused its discretion in denying the section 388 petition because he demonstrated that his circumstances had changed such that his proposed modification served Corey's best interests. Father also contends the juvenile court erred in declining to apply the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). Corey's mother, Alexandra (mother), also appeals. Mother joins in father's opening brief and also contends that if we reverse the termination order as to father, we must reverse the termination order as to her.³ We affirm.

PROCEDURAL AND FACTUAL SUMMARY

Father and mother are an intact unmarried couple. They have three children; Corey, and a twin daughter and son. The children were all born prematurely and are developmentally delayed. Mother is also developmentally delayed and father was the primary caregiver for the children.

In July 2014, the Fresno County Department of Social Services (department) took the children into protective custody after father was arrested for assaulting mother. Corey

¹ Statutory references are to the Welfare and Institutions Code.

² At the same hearing, the juvenile court also denied a separate petition for modification that father brought under section 388 as to his now two-year-old twin son and daughter and terminated his parental rights. Although father listed the twins on his notice of appeal, he does not raise any issues concerning them. Consequently, we deem him to have abandoned his appeal as to them.

³ Mother also listed the twins on her notice of appeal but does not raise any issues as to them. Consequently, we also deem mother to have abandoned her appeal concerning them.

was initially placed in a foster home, and later placed with his maternal grandmother. The twins were placed in a foster home.

The juvenile court exercised its dependency jurisdiction over the children and ordered father and mother to participate in reunification services. Father was specifically ordered to complete a parenting program, a mental health evaluation and a domestic violence assessment. The court also ordered supervised weekly visitation and granted the department discretion to advance to extended visits.

Father completed a parenting program and enrolled in a 52-week batterer's intervention program. He also completed a psychological evaluation (risk assessment) and regularly visited the children. However, Dr. Tamika London, who conducted father's risk assessment, concluded that he posed a substantial risk to the children and that services were not likely to reduce that risk. Dr. London based her opinion on father's lack of insight into his abusive behavior, denial of his need for services and his inattention to the children. Dr. Timothy Cox, a therapeutic visitation therapist, concurred. He characterized the quality of father and mother's visits as "horrible" and, in March 2015, after observing only five visits, advised the department "that permanency planning, sooner rather than later, would be in the best interest of the children."

In September 2015, the juvenile court conducted a contested six-month review hearing. Father presented evidence that he completed 31 sessions of the batterer's intervention program. However, he had only achieved a marginal rating. The court found that father and mother failed to participate regularly and make substantive progress in their court-ordered services and terminated reunification services after also finding there was not a substantial probability the children could be returned to their custody by the 12-month review hearing.⁴ Specifically, the court found that father had the capacity

⁴ In assessing the probability of return, the juvenile court may consider any relevant evidence, including whether a parent has consistently and regularly contacted and visited the minor, whether the parent has made significant progress in resolving the problems

to complete the program but not the capacity to complete the objectives of the program or to safely parent the children and meet their special needs. The court explained that it accepted father's evidence that he was not developmentally delayed although it could not reconcile that evidence with other evidence before it. The court expressed concern about the domestic violence between father and mother and father's failure to address and take responsibility for it. The court was also concerned about the disparity in their intellectual abilities and mother's inability to protect herself and the children from the abuse. The court did not believe that father could alleviate its concerns in the remaining 15 days before the 12-month review hearing. The court set a section 366.26 hearing and reduced visitation to once a month under supervision.

Father challenged the juvenile court's setting order by writ petition (Cal. Rules of Court, rules 8.450, 8.452) and we denied it. (*C.C. v. Superior Court* (Dec. 8, 2015, F072251) [nonpub. opn.].)⁵

In January 2016, father petitioned the juvenile court under section 388 to vacate the section 366.26 hearing and return the children to his custody or continue reunification services for him. He alleged his circumstances had changed because he completed the batterer's intervention program. He also alleged his proposed orders would serve the children's best interests because he was the children's primary care provider from birth until they were detained, he and the children had a positive and significant bond, he had benefitted from the additional service he completed, and his family was also strongly bonded to the children and would assist him when needed. Father included with his petition monthly progress reports for October to December 2015 for the batterer's

that led to the minor's removal, and whether the parent has demonstrated the capacity and ability to complete the objectives of his or her case plan and to provide for the minor's safety, protection, physical and emotional well-being, and special needs. (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 181.)

⁵ On our own motion, we take judicial notice of the entire appellate record in case No. F072251.

intervention program and a certificate of completion issued in January 2016. In the December progress report, the facilitator commented that father seemed to have maintained “a beneficial change in beliefs,” and had explained that the wellbeing of his children was his main priority.

In its report for the section 366.26 hearing, the department recommended the juvenile court find that the children were likely to be adopted and terminate parental rights. The department reported that father and mother regularly visited the children but did not understand the children’s needs and delays and required the presence of an adult at all times when taking care of the children. They were nurturing and the children allowed them to hold them but the children did not return their affection. In addition, the prospective adoptive parents were committed to adopting the children and the children were doing well in their care. Corey was diagnosed with macrocephaly and mild developmental delay but was making good progress and only required clinical monitoring. The twins were receiving services for their developmental delays and were reportedly improving. The prospective adoptive parents were also committed to maintaining the sibling relationship through frequent visits. They communicated weekly, updating each other about the children’s wellbeing. Corey knew that the twins were his brother and sister and he enjoyed playing with them when they came to his house.

In January 2016, the juvenile court conducted a contested consolidated hearing under sections 388 and 366.26. The paternal grandmother testified she would provide father transportation and receive medical training to help care for the children if the court granted his section 388 petition. She described father’s relationship with Corey as “inseparable,” “very bonded. She said father was loving and nurturing.

Father testified that between the time the juvenile court terminated his reunification services in September 2015 and he completed the batterer’s intervention program in January 2016, he developed a better understanding of how the choices he made affected his children. During those four months, he was exposed to new topics

such as celebrating even small things, planning, understanding how situations can affect others and respecting others. He better understood that every moment of his children's lives was important and worth celebrating and that his choices affect them and their futures.

Father further testified that Corey ran to him, hugged him and told him he loved him when he arrived for visits. They played with cars and games. The twins were newborn when they were removed from him but he developed a "fairly strong" relationship with them during visits. He was living with mother but they planned to separate. If the court returned the children to him under family maintenance, he would get his own place and find a job. He planned to attend college and was applying for financial aid. He would enroll Corey in preschool and arrange to have him taken to and picked up from school. He would also arrange daycare for the twins and his family would assist him with the children. If the court did not return the children to him, he was willing to participate in services. He believed it would be detrimental to terminate his parental rights to Corey because he and Corey loved each other and it would "crush" Corey. He believed it would be detrimental to the twins because he could provide the best care for them and take them to their medical appointments. He believed he exerted the most influence over them because he was their father.

Mother testified she did not agree with the recommendation to free her children for adoption. She believed Corey should be with father because he was "really attached" to him. She said she loved Corey and that he loved her and was very affectionate with her.

At the conclusion of the hearing, the juvenile court denied father's section 388 petition, explaining that the completion of the batterer's intervention program did not address the more complex problems of functional capacity and judgment that necessitated the children's removal. The court found that father's circumstances had not changed and that it was not in the children's best interest to place them in his custody under family

maintenance services or reinstate reunification efforts. The court also found that the children were adoptable and that the beneficial relationship exception to adoption did not apply and terminated parental rights.

This appeal ensued.

DISCUSSION

I. Section 388 Petition

Father contends the juvenile court abused its discretion by denying his modification petition because he made “great progress” in his interactions with Corey during visitation, “completely resolved” the problems that led to the dependency and demonstrated that he was fully capable of caring for Corey in a safe and secure home environment. We find no abuse of discretion.

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child’s welfare requires the modification sought.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 611-612.)

“A petition for modification is ‘committed to the sound discretion of the juvenile court, and the trial court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]’ [Citations.] ‘... “[‘]The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ ” [Citation.]’ ” (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116-1117.)

“Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citations.]” (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.)

Section 388 is “an ‘escape mechanism’ when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) It is not enough for a parent to show an incomplete reformation or that he is in the process of changing the circumstances which led to the dependency. “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation].... A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “ ‘A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent ... might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.’ ” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

When the juvenile court terminated father’s reunification services, it did so because he did not have the capacity to complete the objectives of the batterer’s intervention program (the program). In other words, the court did not believe that father could safely parent Corey and provide for his special needs. The juvenile court had the opinions of two professionals, Drs. London and Cox. Dr. London opined that father

lacked insight into his behavior and placed Corey at a substantial risk. Dr. London did not believe services would reduce that risk. Dr. Cox observed the risk firsthand and characterized father's interaction with Corey and the twins as "horrible."

When father completed the program four months later, he did not demonstrate a change in circumstances. Rather, he demonstrated what the juvenile court already found—i.e., that he was capable of completing the technical requirements of the program. In order to establish a change in circumstances, he had to show that in those intervening four months, he developed the ability to safely parent Corey.

Father contends he demonstrated a positive change in his ability to treat mother appropriately and safely parent Corey, citing the program progress reports for October through December 2015 and the department's visitation reports for the same time period. He points out, for example, that he improved from "often" to "almost always" (within the "satisfactory" category) in the area of demonstrating a constructive change in beliefs and from "marginal" to "satisfactory" in the areas of developing strategies to prevent a reoccurrence of violent and abusive behavior and showing commitment to constructive personal change. He also points to the department's "glowing visitation report" of his visits with Corey, asserting "It is obvious that father made a complete turnaround in his attitude toward, and treatment of, mother and the children." The record, however, does not support father's assertions.

As stated above, section 388 serves as an "escape mechanism" for a parent facing termination of his parental rights to demonstrate that through a legitimate change in circumstances the problem that necessitated juvenile court intervention has been resolved or significantly improved. Here, there is no demonstrable evidence that father was better able to safely parent Corey in January 2016 than he was in September 2015. The fact that father completed the program merely demonstrates that he satisfied the curriculum requirements. It did not signify that he was a safer parent or address the concerns raised by Drs. London and Cox. Further, the visitation reports are not "glowing." The observer

described appropriate parent/child interaction in a structured setting. Given the evidence it had before it, the juvenile court properly found father failed to show a change in circumstances.

Even assuming the juvenile court erred in failing to find father changed his circumstances, the court properly denied the section 388 petition because father did not meet his burden of showing that granting the petition was in Corey's best interests. He alleged in his petition that returning Corey to his care or continuing his reunification services would serve Corey's best interest because he raised him until his removal and they had a "positive and significant bond." The department established, however, that Corey, who was three and one-half years old at the time of the hearing, had been in his grandmother's care for approximately eight months, he was doing well there and she was committed to adopting him. Further, contrary to father's own statement and his mother's testimony, there is no evidence that Corey is bonded to him.

We conclude, based on the foregoing, the juvenile court properly exercised its discretion in denying father's 388 petition.

II. Parental Benefit Exception to Termination of Parental Rights

Section 366.26 governs the proceedings at which the juvenile court must select a permanent placement for a child adjudged its dependent. If the court determines it is likely the child will be adopted, the statute requires the court to terminate parental rights. (§ 366.26, subd. (c)(1).) The court's prior finding that it would be detrimental to return the child to parental custody, and its order terminating reunification services, constitute a sufficient basis for terminating parental rights unless the court finds that one of the six exceptions specified in section 366.26, subdivision (c)(1)(B) would render termination of parental rights detrimental to the child. The party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions bears the burden of producing the evidence. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

When a juvenile court concludes that the party with the burden of proof did not carry the burden and the court rejects a detriment claim and terminates parental rights, the first issue on appeal is whether the evidence compels a finding for appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571.) “Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ ” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) If appellant prevails, then the next question is whether the existence of that relationship constituted a “compelling reason for determining that termination would be detrimental” (§ 366.26, subd. (c)(1)(B)), thus rendering the juvenile court’s termination order an abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315.) We conclude father failed to establish the existence of a beneficial relationship as a matter of law.

Father contends the beneficial relationship exception applied because he maintained regular visitation and contact with Corey and because he maintained the “parental role” he occupied before Corey was removed from his custody. He points to evidence that Corey hugged him and told him that he loved him and looked to him for assistance in carrying a toy barn and in identifying colors, shapes and names of animals.

It is undisputed that father regularly visited and maintained contact with Corey. However, he fails to show that Corey would benefit from continuing his relationship with him. “To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child.” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527.)

As we noted above, Corey had spent eight months of his young life in his grandmother’s care by the time of the section 366.26 hearing in January 2016. His only contact with father was during visitation which had been supervised the entire

dependency. Further, though father and Corey were affectionate and loving together, there is no evidence that Corey viewed him as a parental figure.

Further, even if father had established a beneficial relationship, he would be hard-pressed on this evidence to show that terminating his parental rights would be detrimental to Corey. There was indisputable evidence that Corey was adoptable and that his grandmother wanted to adopt him. Further, there was no evidence that terminating parental rights would be detrimental to Corey.

We conclude the evidence in this case does not compel a finding as a matter of law that father had a beneficial relationship with Corey. Consequently, the beneficial relationship exception to adoption does not apply and the juvenile court did not err in terminating father's parental rights. Thus, we affirm.

DISPOSITION

The orders of the juvenile court are affirmed.